

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALD HARRELL and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION, Yorktown, Va.

*Docket No. 97-67; Submitted on the Record;
Issued October 23, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity as a property manager.

In the present case, the Office accepted that appellant, a materials handler, sustained a cervical strain in the performance of duty on August 20, 1991. Appellant returned to a light-duty position, and his employment was terminated on February 28, 1992.

In a letter dated March 4, 1996, the Office advised appellant that it proposed to reduce his compensation based on a wage-earning capacity of \$325.00 per week as a property manager. In a decision dated May 28, 1996, the Office reduced appellant's compensation on the grounds that the position of property manager fairly and reasonably represented appellant's wage-earning capacity.

The Board has reviewed the record and finds that the Office properly reduced appellant's compensation.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.¹

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the

¹ *Carla Letcher*, 46 ECAB 452 (1995).

availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.²

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.³ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁴

In this case, a rehabilitation counselor identified three constructed positions that would be appropriate for appellant. One of the positions identified was that of property manager (*Dictionary of Occupational Titles* No. 186.167.046). In a job classification report (Form CA-66), the rehabilitation counselor indicated that the position involved lifting of up to 20 pounds and was primarily involved working inside. The report indicated that availability in appellant's commuting area had been confirmed by a state employment service representative, and the weekly wage was \$325.00.

The initial question presented is whether the selected position is within appellant's medical restrictions. In this case, the most recent medical evaluation was from an attending physician, Dr. Richard B. McAdam, a neurosurgeon, who provided a February 15, 1996 report.⁵ Dr. McAdam diagnosed status post anterior cervical discectomy and fusion with complaints of pain in the neck and left upper extremity weakness, normal neurological examination, and mild carpal tunnel syndrome. He further stated, "It is my opinion that this man could work within reasonable guidelines not to lift more than 40 to 50 pounds with minimal overhead work. With these restrictions, he should be able to work a normal 40-hour work week."

The Board notes that the selected position required only 20 pounds lifting and there is no indication that the job duties involved overhead work. Based on the restrictions provided by Dr. McAdam, the Board finds that the selected position was within appellant's physical restrictions.

With regard to availability of the position, the rehabilitation counselor indicated that the position was reasonably available in appellant's commuting area based on information from the

² See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

³ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁴ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.303.

⁵ The record also contains a February 16, 1995 report from Dr. Steven C. Blasdell, an orthopedic surgeon, selected as a second opinion referral physician, who provided a lifting restriction of 75 pounds. Since this report was over a year old at the time of the proposed wage-earning capacity determination, it is of diminished probative value; see *Keith Hanselman*, 42 ECAB 680 (1991).

state employment agency. There is no contrary evidence, and the Board finds that the Office properly gave due regard to the availability of suitable employment in this case.

In reviewing the factors enumerated under section 8115(a), the Board finds that the Office gave due regard to these factors in determining appellant's wage-earning capacity. The Office therefore properly reduced appellant's compensation based on a wage-earning capacity of \$325.00 per week in accord with the principles set forth in *Shadrick*.

The decision of the Office of Workers' Compensation Programs dated May 28, 1996 is affirmed.

Dated, Washington, D.C.
October 23, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member